

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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74-1275

To be argued by
KENNETH J. KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1275

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH LISI,

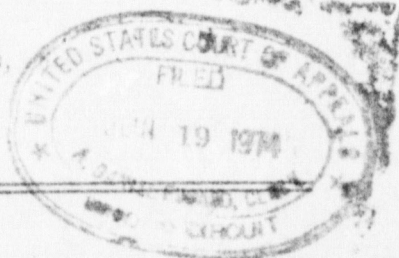
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

RAYMOND J. DEARIE,
KENNETH J. KAPLAN,
*Assistant United States Attorneys,
Of Counsel.*



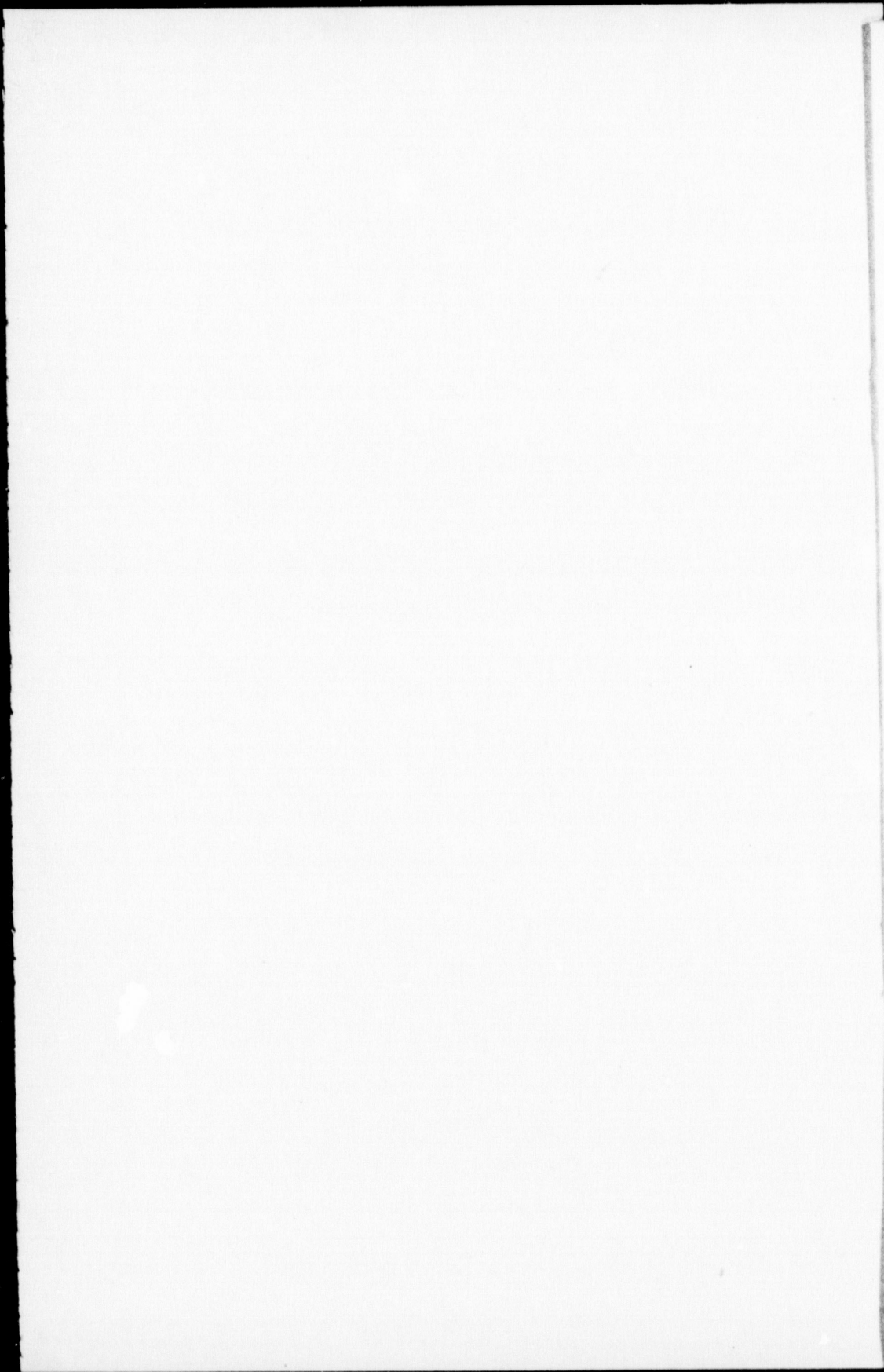


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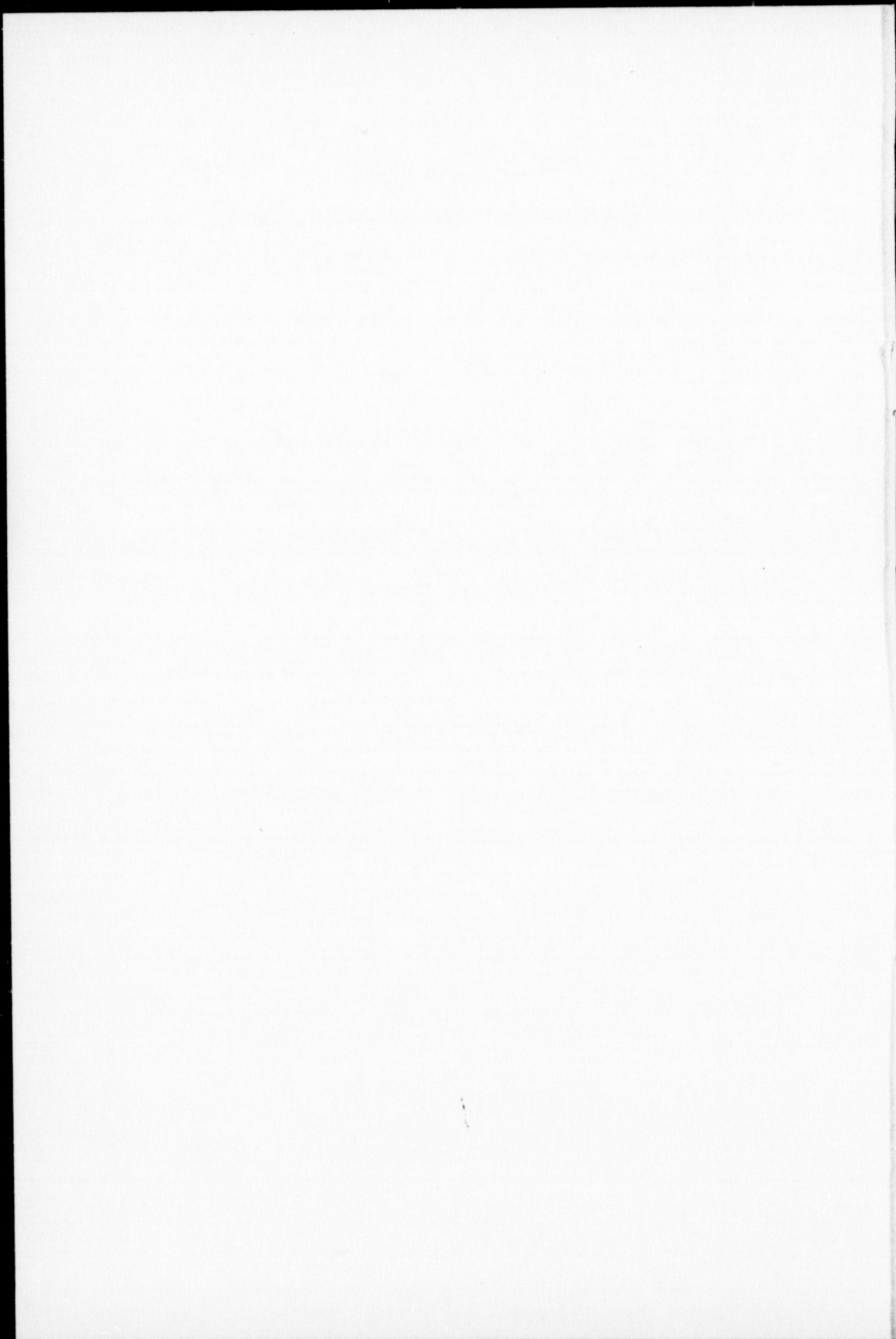


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1275

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH LISI,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Joseph Lisi appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*), entered on February 22, 1974, which judgment convicted appellant, after a jury trial, of willfully and unlawfully receiving and possessing stolen merchandise having a value in excess of one hundred dollars (\$100.00), which goods had been stolen while moving as a foreign shipment of freight, in violation of Title 18, United States Code, Section 659 (Count One), and of conspiracy to receive and possess the stolen merchandise in violation of Title 18, United States Code, Section 371 (Count Two).

Appellant was originally indicted together with Louis Felice, Henry Serrapica, Anthony Annicharico and Thomas Lisi, appellant's father. Felice and Serrapica entered pleas of guilty to a count of the original indictment (71 Cr. 524). A superseding indictment was then filed with respect to the

remaining three defendants. The case against Anthony Annicharico was subsequently dismissed. Thomas Lisi and Joseph Lisi were tried together with a jury verdict resulting in an acquittal on all counts for Thomas Lisi.

On February 22, 1974, appellant received a four year sentence which was suspended for all but three months; the three months to be served at the Community Treatment Center in Manhattan, pursuant to Title 18, United States Code, Section 3651. Appellant was also placed on probation for a period of four years, the sentence to run concurrently on each of the two counts. Appellant is presently on bail pending this appeal.

Appellant does not challenge the sufficiency of the evidence, but contends the Government improperly withheld certain 3500 material which denied him a fair trial.

Statement of Facts

(1)

Government's Direct Case

On December 15, 1970, at approximately 4:30 P.M., a tractor-trailer containing approximately \$100,000 worth of radios, walkie-talkies, dinner sets and other goods was stolen a few blocks from 76 DeGraw Street, Brooklyn, New York (14-17).^{*} The goods had recently arrived as part of a foreign shipment of freight from Tokyo, Japan (16-17). At approximately 5:25 A.M. on the following morning, a surveillance was commenced by Ronald Pyle, Special Agent of the Federal Bureau of Investigation, together with other agents. The surveillance was conducted outside the premises known as 76 DeGraw Street, Brooklyn, a warehouse building described as "a one story brick build-

^{*} Numbers refer to minutes of trial transcript.

ing with four or five roll-up doors" (23). More specifically, the agents surveilled "one garage door and the small door on the side" (25). The agents had secured a search warrant for these premises (21).

At approximately 6:52 A.M., the agents observed a blue Chevrolet vehicle containing three individuals arriving at the front of the warehouse. These individuals remained in the area for some ten or fifteen minutes (25). Approximately one-half hour later, co-defendant Henry Serrapica drove up to the front of the building, parked his Cadillac automobile and entered the premises through a small side door which he unlocked with a key. He then opened the "big garage door" (bay door). A few minutes thereafter, Louis Felice was observed driving a Dodge "straight truck" down the street and then through the bay door (26). Felice and Serrapica then left the building. Felice returned in five minutes in the same Cadillac, only to leave and then return again during the course of some ten minutes. Four or five minutes after Felice entered the building, the agents observed a brown Buick, containing two individuals park in front of the building. The occupants of the Buick entered the building. Two minutes later, at approximately 8:02 A.M., Felice and Serrapica exited from the building and drove away. At approximately 8:20 A.M., Serrapica returned in the Cadillac, followed by Felice in another Dodge truck, which was driven through the bay door of the building (26-28).

Some five minutes later, appellant Joseph Lisi was observed driving a 1970 Monte Carlo Chevrolet from the garage onto the street (29). This vehicle was owned and operated by Lisi and Son, Inc. (18). Ten minutes later the two individuals in the brown Buick exited the premises. At approximately 8:45 A.M., appellant returned in the Chevrolet, parked the vehicle in the street and entered the building (30-31).

At approximately 9:45 A.M., Thomas Lisi, the father of Joseph Lisi arrived in a yellow Chevrolet automobile. He then entered the premises. Approximately fifteen minutes after Thomas Lisi arrived, Felice left the building, entered the Cadillac and drove away. A few minutes later, Serrapica exited (31-33). About three or four minutes later, appellant Joseph Lisi was observed driving the Monte Carlo Chevrolet from the street into the building, through the bay door (32-33). Ten minutes later, at 10:14 A.M., Anthony Annicharico drove a green panel truck through the bay door. One minute later the agents discontinued surveillance and entered the premises with a search warrant (33).

Upon entering, the agents observed two straight trucks backed up to the loading platform at the rear of the premises. The green panel truck was also backed up to the loading dock, with Annicharico sitting in the truck and Serrapica standing behind it (34). The two Lisis were in a partitioned office inside the premises (34).

The straight trucks were loaded with cartons of stolen merchandise and the loading platform contained numerous other cartons of the goods from the previous day's hijacking (17, 37-38). A stolen walkie-talkie was found in the office. Inside the 1970 Monte Carlo Chevrolet driven by appellant Joseph Lisi was a stolen dinner set and two stolen walkie-talkies (38-40). Also seized was a lock which came from the hijacked truck (18-18).

The building in question, 76 DeGraw Street, was leased to Lisi and Son, Inc., a corporation, which was then in operation at the premises (18).

The Defense

Thomas Lisi, the co-defendant and father of Joseph Lisi, testified that he had been the owner of Lisi and Son, a storage warehouse, since June 1970. His primary function was to solicit business (100, 126). He stated that Louis Felice was his employee and had the keys to the business (100).

Thomas Lisi further testified that his son, Joseph, was not employed at the business in December of 1970, but came to work on December 16, 1970 because of an injury suffered by the father. Thomas asked Joseph to receive phone calls from customers (103-106).

Thomas Lisi stated that he arrived at the warehouse at approximately 10:00 A.M. on December 16, 1970, in a Chevrolet Nova automobile rented in the name of the corporation. In addition to this car, a 1970 Chevrolet Monte Carlo was also registered to the corporation (108). According to the father, the Monte Carlo Chevrolet was used for deliveries. When Joseph was working, he was permitted to use the vehicle. The keys to the automobile were kept in the office (134-135).

Appellant Joseph Lisi also testified at trial. He stated that he was employed by the corporation from the beginning of 1970 until September, 1970 (144). He was unemployed during December of 1970 and "just hanging around the house" when his father asked him to answer the phones on December 16th (154, 145-146). After he did some work in the office he left for breakfast using the Monte Carlo Chevrolet (146-147). He saw the cartons on the platform and testified that he did not know they were stolen (152, 164). He further testified that he was working in the office on December 16th, answering the telephone at the desk, but did not remember seeing the stolen walkie-talkies or radios on the desk (167).

(3)

Rebuttal Case

The Government established, on its rebuttal case, that a shipment of yarn, stolen on December 4, 1970 was discovered in the Lisi & Son's premises on December 16, 1970. The yarn was contained within the drums or barrels which Lisi and Son used in connection with its business (186-188, 193-196, 137).

ARGUMENT

Appellant's claim that "the purposeful withholding of 3500 material by the Government denied the defendant a fair trial" is entirely without merit.

Prior to the opening statements of counsel, the Government delivered to defense counsel the entire F.B.I. case report relating to the Government's case-in-chief (3). In substantial part this material dealt with the surveillance at 76 DeGraw Street by the F.B.I. including the eventual execution of a search warrant at those premises and the subsequent arrest of appellant and his co-defendants and, of course, the seizure of the merchandise stolen on December 15, 1970. During the Government's direct case, Special Agent Ronald Pyle testified concerning the F.B.I. investigation following the theft and specifically related his activities and that of his fellow agents during the surveillance, arrests and seizure of the stolen merchandise. During the Government's direct case, several pictures of the interior of the warehouse at 76 DeGraw Street were introduced in evidence. During the cross-examination of Agent Pyle, one of the pictures of the interior was presented to the agent by counsel for appellant, and the following exchange took place:

Q. Do. you see containers? A. Yes.

Q. Did they contain merchandise? A. I know what they contain, some of them. Do you want me to describe what I found inside?

Q. You can do that. A. We opened several of the containers and discovered an unknown chemical substance and in numerous other containers we discovered some rolls of stolen—yards of piece goods, apparently re-packed into these containers (55-56).

Counsel for appellant immediately moved unsuccessfully for a mistrial. His claim on appeal is that the Government's alleged failure to provide him as 3500 material the F.B.I. report concerning the stolen piece goods (a theft unrelated to the charge in the indictment) denied him a fair trial.*

Appellant's claim that the report dealing with the theft of the piece goods was 3500 material and should have therefore been delivered to counsel is totally without merit. His real complaint results from the fact that his cross-examination of Agent Pyle inadvertently and unexpectedly revealed similar acts of appellant and his co-defendants. Agent Pyle's direct testimony dealt only with the facts and circumstances underlining the indictment and in no way dealt with the seizure of the otherwise unrelated stolen piece goods. Because it did not relate to the direct testimony of Agent Pyle, the report concerning this theft does not come within the definition of 3500 material.** Agent Pyle's

* This theft occurred on December 4, 1970 when a tractor trailer carrying 134 cartons of spools of unfinished wool yarn was seized by armed hijackers in the vicinity of Pier 7 in Brooklyn.

** Section 3500 provides in pertinent part:

“(b) After a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.”

direct testimony did not include a single reference to this second theft. Even assuming that Pyle did testify as to the seizure of the stolen piece goods on his direct case, an examination of the report which appellant claims to be 3500 material reveals that only one page of the 13 page report would conceivably be 3500 material. The report itself is that of Special Agent Gordan C. Strand (Appellant's Appendix A. 44-51). It outlines the December 4, 1970 armed hijacking and the resulting loss of 134 cartons of unfinished wool yarn. For the most part, the report contains summaries of statements to the F.B.I. by the driver of the tractor trailer, the owner of the trailer and a New York City detective who conducted a parallel investigation of the theft. There is not a single reference in this report of the December 15th theft which was charged in the indictment. Agent Pyle's name appears on only one page (page 13; A. 51) where the inventory of the seizure of the stolen piece goods is reported.

In any event, it should be emphasized that the entire report of Agent Strand was delivered to defense counsel in sufficient time to permit thorough cross-examination of Agent Pyle and prior to the defense case. Judge Weinstein assured defense counsel that he would permit Agent Pyle to be recalled for further cross-examination. In fact, Agent Pyle was recalled by the defense but he was not questioned about his testimony concerning the theft of December 4, 1970 and the seizure of the stolen yarn at appellant's garage.

Finally, appellant makes absolutely no claim that the "3500 material" contained any inconsistent statement of Agent Pyle which could have been utilized by defense counsel as ammunition for cross-examination of Agent Pyle. While appellant's argument is couched in 3500 terminology, it is clear that his real complaint is over the introduction of the evidence of similar acts undertaken by appellant

and his co-defendants. In view of the well settled state of the law in this Circuit, it is understandable why appellant does not now challenge the introduction of the highly probative evidence of similar acts which understandably assisted the jury in deciding the crucial issue of appellant's knowing participation. *United States v. Brettholz*, 485 F.2d 483 (2d Cir. 1973), *cert. denied*, — U.S. —, 94 S.Ct. 1561 (1974); *United States v. DeCicco*, 435 F.2d 478 (2d Cir. 1970); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967). Appellant's frivolous claim that the Government somehow breached the requirements of Section 3500 should be summarily discarded.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

June 19, 1974

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
KENNETH J. KAPLAN,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 19th day of June, 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~2~~ 2 copies of the BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Maurice Brill, Esq.

291 Broadway

New York, N. Y. 10007

Sworn to before me this
19th day of June, 1974

Frances A. Grant

FRANCES A. GRANT
Notary Public, State of New York
No. 41-4503731

Qualified in Queens County
Commission Expires March 30, 1975

Deborah J. Amundsen
DEBORAH J. AMUNDSEN